



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

**Order 96-7-15**

Issued by the Department of Transportation  
on the 11th day of July, 1996

**SERVED: July 12, 1996**

**1996/1997 U.S.-BRAZIL ALL-CARGO CHARTER PROCEEDING**

**Docket OST 96-1242**

**ORDER ALLOCATING CHARTERS**

**Summary**

By this order we make final our tentative decision in Order 96-6-43, with the modifications noted below, and allocate the 450 U.S.-Brazil all-cargo charters available for allocation for the 1996-97 charter year as follows: Millon Air, Inc., 102; Southern Air Transport, Inc., 81; Tower Air, Inc., 58; Arrow Air, Inc., 54; Florida West Airlines, Inc., 53; and ABX, Inc., 20. In addition, 82 charters are reserved in a charter pool for *ad hoc* distribution and use under conditions discussed below.

**Background**

Under the U.S.-Brazil Air Transport Agreement, as amended, U.S. carriers are entitled to operate 450 round-trip all-cargo charter flights per charter year (July through June). The Agreement also provides that requests for charters beyond that number by designated airlines will be treated sympathetically by the other party. By Order 96-6-43 we proposed to allocate the available charters as follows: Millon, 99; Southern, 76; Tower, 60; Arrow, 55; Florida West, 53, and Fine, 23, with a charter pool of 84. In addition, because we recognized that we would not be able to complete this proceeding before the beginning of the 1996/97 charter year on July 1, we made a *pro rata* allocation to each of the carriers as well as the charter pool, to accommodate operations during July pending our final decision in this proceeding.

We also stated that upon conclusion of the 1995/96 charter year we would review our records and would reduce any allocation made in this proceeding by the number of charters wasted by carriers having allotments and either not using them or not returning them for subsequent allocation to other carriers.

### **Responsive Pleadings**

ABX Air, Inc. (ABX) and Emery Worldwide Airlines, Inc. (Emery) filed objections to our tentative decision. Florida West International Airways, Inc. and Tower Air, Inc. (Tower) also filed comments.<sup>1</sup> Arrow Air, Inc. (Arrow), Emery, Millon Air, Inc. (Millon), Southern Air Transport, Inc. (SAT), and Tower filed answers.<sup>2</sup>

ABX objects to the Department's decision not to allocate any flights to ABX and also to the conditions imposed on the charter pool. ABX states that based on operations conducted in June, it operated a total of 20 flights during the 1995-96 charter year rather than 16 as estimated by the Department for year-end projections, and as such under the Department's formula, it would be entitled to an allocation of 20 charters for the 1996-97 charter year. In the event that it is not awarded at least twenty flights, ABX requests that the Department revise the charter pool conditions to reserve a portion of the pool flights for later in the 1996/97 year in order to protect the rights of those carriers receiving no allocation to conduct flights later in the year. Specifically, ABX urges the Department to reserve half of the 84 tentatively reserved pool flights for use after January 1, 1997.

Emery objects to Order 96-6-43 to the extent it permits carriers receiving advance allocations to draw pool flights before May 1, 1997. Emery maintains that if the Department finalizes its tentative allocations for the 1996/97 charter year, the Department should (a) revise the charter pool rules so that carriers receiving advance allocations, like carriers with scheduled service authority, are ineligible for allocation of pool flights through April 30, 1997, and (b) allocate no fewer than 84 flights to the charter pool.<sup>3</sup> Emery contends that if advance allotment carriers have access to the pool too early in the charter year, they could exhaust the pool, precluding carriers with no advance allotments from serving the market. In addition, Emery requests the Department to clarify that charter contracts need only be submitted with applications for flights from the pool after April 30, 1997.

Florida West confirms that it will accept the 53 charter flights tentatively allocated to it by Order 96-6-43, which is fewer than the 64 flights requested. It submits, however, that under the Department's formula, it should be allocated 56 rather than 53 flights since it will have

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<sup>1</sup> Order 96-6-43 directed Florida West and Tower to notify the Department whether they would accept an allocation of fewer than the number of flights requested. Order 96-6-43 at 7 & 11. Tower Air filed a letter; Florida West responded to the Department's directive and included additional comments with respect to the Department's order.

<sup>2</sup> Arrow's, SAT's, and Tower's answers were accompanied by separate motions for leave to file one-day late. In the interest of having a complete record, we will grant the motions.

<sup>3</sup> Emery states that in truly extraordinary circumstances, scheduled carriers and carriers with advance allocations could request waivers to use pool flights before May 1, 1997.

operated 60 charter flights between the U.S. and Brazilian points by the end of the 1995-1996 charter year, and urges the Department to increase its charter allocation to 56 flights.

Tower also confirmed that it would accept the allocation of flights proposed in the show-cause order.

In response to the pleadings filed, Emery opposes an advance allocation to ABX and an increase to Florida West, because the formula used by the Department for awarding advance allocations is based on flights operated for the eleven-month period July 1, 1996 - May 30, 1996, and that a different allocation formula should not be used for these carriers. Should the Department determine to increase those allocations, however, Emery states that the additional flights should come from the 1996/97 Brazil charters tentatively allocated to other carriers and not from the charter pool. Emery agrees with ABX that changes need to be made to the proposed charter rules to protect the rights of carriers that do not receive advance allocations, but disagrees with ABX's proposed change, stating that reserving half of the pool flights until after January 1, 1997 (as proposed by ABX) would not protect the rights of carriers without advance allocations adequately because it would not prevent carriers with advance allocations from using pool flights after September 30, 1996.

Millon and SAT support the Department's tentative decision. SAT notes that that nothing raised by the objectors requires any modification to the Department's order and maintains that carriers receiving advance charter allocations should be permitted to draw pool flights as necessary, when their charter allocations have been used, subject only to the rules historically imposed to protect the pool. SAT states that Emery's and ABX's procedure for allocating charter pool flights would, in fact, "waste" charter allocations by preventing those carriers who have demonstrated an existing and future demand for their services from being able to conduct charter flights according to demand.

Arrow also disagrees with Emery's suggestion that carriers receiving advance allocation should be barred from the charter pool until after April 30, 1997, noting that if a carrier receiving an advance allocation exhausts its allocation before April 30, 1997, there is no justification for keeping it out of the charter pool until the last two months of the charter year. Arrow agrees, however, with Emery that copies of charter contracts should not be required for pool applications until after April 30, 1997. Arrow takes no position as to whether ABX should be allocated advance charters, but objects to Emery's suggestion that such charters should come from the allocations of other carriers.

Tower objects to ABX's request for 20 charters because grant of such a request will require that other carriers not operate charters for customers with whom they already hold contracts and this would not be in the public interest.

### **Final Allocation**

We have decided to make final our proposal on Order 96-6-43, except that we will adjust the allocations to reflect the actual, rather than projected, year-end operations of the applicant

carriers and to reflect adjustments based on wastage by carriers not using their 1995/96 allocations. As a result of these adjustments, we will allocate a total of 368 charters to program operators and maintain the balance of 82 charters in a charter pool for distribution on a first-come, first served basis. We will also modify the charter pool rules to delay the date on which carriers with an advance allocation may participate in the charter pool until January 1, 1997. Finally, we clarify that contracts or written evidence must be submitted with any request for a charter from the charter pool, not just requests for charters to be operated after April 30, 1997.

In our tentative decision, we determined that, based on past experience in allocating Brazil all-cargo charters, the allocations for this charter year should be based on an applicant carrier's past performance in the market. We specifically chose the carrier's performance in the most recent charter year as an indicator of its future performance in the market. Thus, where carriers operated at least the number of flights allocated for the 1995/96 charter year, we concluded that they should be allocated at least that number this year. We concluded that those carriers had demonstrated the demand for their services and their ability to make full use of the flights. To the extent those carriers operated more flights than they had been allocated, we concluded that they should be granted an increased allocation. We proposed a formula whereby the increase would be equal to one half of the number of flights they operated in excess of their 1995/96 charter allocation. We also proposed that carriers that operated at least 20 flights in the 1995/96 charter year be awarded a 1996/97 charter year allocation equal to the number of flights operated in the 1995/96 charter year. Applicant carriers that did not serve the Brazil market last year or that operated fewer than 20 flights were to obtain flights from the charter pool. Based on this methodology, we proposed to allocate 366 charters for program operations and to reserve 84 flights in a charter pool for allocation on an *ad hoc* basis.

No party has objected to the rationale underlying our allocations and, therefore, we will make final our proposed allocations except to adjust the final allocations to take into consideration the actual year-end operations of the carriers including the effect on allocations as a result of wastage of 1995/96 charters. At the time we issued our show-cause order, we had flight reports from the carriers only through May 1996. Therefore, we projected a twelve-month year-end total based on the monthly average operations of the carriers. Since we now have actual year-end operating results, we have decided to adjust our final allocations to take the actual, rather than the projected, year-end operations into consideration. Overall, the modifications result in minor adjustments to the proposed allocations with one exception. Based on actual year-end results, ABX operated a total of 20 charters, and thus, under our methodology is eligible for an allocation of 20 flights.

The adjustments are summarized in the following table:

Carrier	DOT Projected YE operations	Proposed 96/97 Allocations	Actual 95/96 Operations	Adjusted Allocation
Millon	146	99	151	$102:52 + \frac{1}{2}(151-52)$
SAT	99	76	110	$81:52 + \frac{1}{2}(110-52)$
Tower	68	60	63	$58:52 + \frac{1}{2}(63-52)$
Florida West	53	53	54	$53:52 + \frac{1}{2}(54-52)$
Arrow	55	55	56	$54:52 + \frac{1}{2}(56-52)$
Fine	23	23	21	no allocation <sup>4</sup>
ABX	none projected	none	20	20 <sup>5</sup>
Total		366		368
Charter Pool		84		82

We are unpersuaded by the arguments of Emery and Tower that ABX should not receive an allocation. Contrary to Emery's assertions, we did not arrive at our tentative allocations on an eleven-month basis. We specifically noted that we were projecting year end total flights operated based on the average number of flights carriers operated during the eleven-month period.<sup>6</sup> Given that actual year-end operations are available before our final decision in this case, we believe that fairness dictates that we make adjustments to the carriers' allocations based on actual performance.

Nor are we persuaded by Tower's arguments that ABX should not receive an allocation because other carriers already have contractual agreements. No party receiving an allocation has had its allocation altered as a consequence of our award to ABX, and thus no party receiving an allocation has been adversely affected by the additional award to ABX.

### **Fine Airlines' Allocation**

We have decided not to make final our tentative allocation of 23 flights to Fine Airlines. When we issued our show-cause order, our allocation to Fine was based on a year-end projection of flights it would operate and based on its statements that it had a firm contract to

<sup>4</sup> Of the 52 charters allocated Fine by Order 95-6-35, Fine operated only 21 flights. Of the 31 remaining flights, Fine returned only 11 in a timely fashion. Twenty of its program charters were not returned until the very end of the charter year (*i.e.* June 27, 1996). As indicated in our notice instituting this proceeding and in our show-cause order, the 1996/97 allocations of any carrier not using or returning 1995/96 charter year flights in a timely fashion would be reduced by the same number of flights not operated in the 1995/96 charter year. Our decision with respect to Fine is discussed later in this order.

<sup>5</sup> On July 3, 1996, based on our decision not to allocate ABX any flights, ABX requested, and was granted, four one-way cargo charter flights for the month of July from the charter pool. In its request, ABX made clear that if the Department grants ABX an allocation in its final order in Docket OST 96-1242, then ABX had no objection to any flights allocated from the charter pool being deducted from its allocation of at least 20 flights for the 1996/97 charter year. Hence, ABX will have 16 charters remaining for its program and four flights granted to ABX from the charter pool for July will be added back to the pool.

<sup>6</sup> See footnote 14, Order 96-6-43.

operate the remaining flights in its program through June, *i.e.*, 20 flights. Fine, in fact, operated only 21 flights for the 1995/96 charter year.

We have repeatedly emphasized that U.S.-Brazil charters are very valuable and that we do not intend that they be wasted.<sup>7</sup> To this end, we stated that we would review our records and should carriers that were allocated flights for the 1995/96 charter year fail to use their allotments and fail to return flights in a timely manner, their awards for this charter year might be reduced by the same number they failed to use in the 1995/96 charter year. No party objected to this proposal.

Upon conclusion of the charter year, we reviewed our records for all charter operators. Our review of Fine's operations shows that during the course of the 1995/1996 charter year, all of Fine's operated flights occurred in the first half of the charter year. Fine reported operation of no flights in calendar 1996 (January through June). In April 1996, in response to the Department's March 29, 1996 letter to all carriers that had been allocated flights for the 1995/96 charter year, Fine returned one of its 52 flights and submitted a contract for the operation of the remaining 30 flights through the end of the charter year. Subsequently, Fine returned 10 flights May 14, 1996 at which time it stated that it "retains its rights to twenty charters which it intends to operate during the months of May and June." Although the flight dates for 16 of these flights had already passed, it was not until June 27, and after issuance of our show-cause order reiterating our plans to reduce future allocations in response to wastage of charter flights, that Fine returned all 20 of the charters. We do not view a return of so many flights just one business day before the end of the charter year as a timely return of flights.

Under our proposed allocations, Fine was to have been allocated 23 charters. Based on the adjusted allocations, it would have been allocated 21 charters. However, based on Fine's wastage of 20 charters, its allocation under our proposed procedures would be reduced to one charter flight. In these circumstances, we have decided not to make final our proposed allocation to Fine, and we will revoke our *pro rata* allocation to Fine for the month of July.<sup>8</sup> Rather than allocating only one flight to Fine, Fine will be able to serve the market through flights obtained from the charter pool. An allocation of only one flight would effectively preclude Fine from participating in the Brazil market since it would not have access to the charter pool until January 1, 1997 (see below). In these circumstances, we believe that operations by Fine through the charter pool better serve the public interest.

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<sup>7</sup> See March 29, 1996 letter to all carriers where we stated "To the extent that flights are not committed by firm contracts and plans, and are not returned voluntarily, the Department will have to consider taking steps to revoke all or a portion of the existing allocations so that the flights can be reallocated to carriers with firm plans to use them." Our April 5, 1996 Notice instituting this proceeding stated "should carriers that were allocated flights for the 1995/96 charters fail to use their allotments or fail to return flights in a timely manner, the presumption will be that their awards for this charter year, if any, may be reduced by the same number of charters they failed to use in the 1995/96 charter year." In our Show-Cause Order we specifically stated that we intended to "review our records and plan to reduce any allocation made here by the number of frequencies wasted by carriers having allotments and either not using them or not returning them for subsequent reallocation to other carriers." Order 96-6-43 at 6.

<sup>8</sup> If Fine operated the two flights under its July allocation, we will deduct such flights from the charter pool.

## Forfeiture and Reallocation Procedures/Reporting Requirements

We will make final our tentative decision to continue the conditions imposed on allocations since 1992. Specifically, this means that carriers must operate at least 40 percent of their allocation within the first six months of the charter year or forfeit a portion of their remaining balance for reallocation through the charter pool. Moreover, we emphasize that each carrier is under a standing obligation to return charters promptly any time that program or *ad hoc* allotment plans change appreciably. Failure to do so in a timely manner could result in reduced allocations in future years. We also remind carriers that once they have applied to the Brazilian Government for the operation of a charter and plans for the operation of the charter change, it is the carrier's responsibility to notify both the U.S. and the Brazilian governments of any changes to original plans as soon as it is known that a flight will be changed and/or canceled. Failure to do so could result in wastage of the charters and the carrier's ability to continue serving the market.

As we have in the past, we require all carriers allocated flights or receiving flights from the pool to report on their operations for the preceding month by the tenth day of each month.

## Charter Pool

The majority of comments filed involved the charter pool. Under our proposal, scheduled carriers could not have access to the charter pool until the last two months of the charter year; carriers receiving allocations would not have access until October 1, 1996. Emery urges us to restrict access to the charter pool by carriers receiving allocations here until after April 30, 1997, essentially until two months before the end of the charter year. SAT and Arrow oppose Emery's suggestion, arguing that such a procedure would lead to wastage of flights and penalize carriers that have used their allocations before April 30, 1997.

We have decided to modify our pool procedures but not to the extent Emery suggests. We have two major objectives with respect to Brazil charters--to maximize use of the flights and to provide all carriers access to the markets. Carriers without charter allocations or scheduled service authority can serve the market only through the charter pool. For that reason, generally speaking, we have kept the pool open primarily to those carriers only. That said, however, past experience has demonstrated that excluding advance allocation carriers from the pool until late in the charter year has resulted in flights being unused.<sup>9</sup> Thus, to ensure that the available flights will be used fully, we do not believe it is in the public interest to exclude advance allocation carriers from the charter pool until the very end of the charter year. Against this background, we have decided to modify the proposed rules to restrict carriers with allocations from using the charter pool until after December 31, 1996, rather than September 30, 1996, as originally proposed. We believe that this change balances the interests of carriers with allocations with those that may serve only through the charter pool and will still help ensure that all of the available flights will be used.

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<sup>9</sup> Orders 92-6-46 and 92-9-22.

We are not persuaded by ABX's suggestion that we reserve half of the flights in the charter pool for use in the last half of the charter year. While we hope that charters will remain available for services throughout the year should demand warrant, we believe that the market should determine how the charter pool flights are operated, and that additional artificial constraints on the charter pool are not in the public interest.

Emery, supported by Arrow, requests that the Department clarify that charter contracts need only to be submitted with applications for flights from the pool after April 30, 1997. In ordering paragraph 3(e) of Order 96-6-43, we inadvertently included the statement that "After April 30, 1997, a copy of the charter contract would also be required." We intended, and will require, that a contract or some other form of commitment by the charterer be submitted with each request for a charter from the charter pool. In the past, carriers have claimed to have needs for charters based on requests that never materialized, and hence charters have been wasted. All requests for flights from the charter pool must be accompanied by a contract or other written evidence cosigned by the charterer that there is a demand for the flight requested. We will modify the charter rules to make this clear.

In all other respects we will make final our tentative decision to use the pool procedures in Order 95-6-18 to govern charters for the 1996/97 charter year.

Finally, only Emery commented on the size of the charter pool. Emery maintains that should the Department make adjustments to its allocations, the size of the pool should not go below 84 as tentatively established in our show-cause order. We disagree. We note that the charter pool is considerably larger (400%) than last year and we have no reasons to conclude, and Emery has presented none, that these flights will not satisfy the *ad hoc* needs of the market. We note that based on our final allocations, the charter pool has only slightly fewer flights than originally proposed. We do not find that this minor adjustment to the pool is inconsistent with the public interest or with the goals we have set forth in this proceeding.

#### **ACCORDINGLY,**

1. We allocate 450 U.S.-Brazil all-cargo round-trip charters for the period July 1, 1996, through June 30, 1997, as follows:

Millon Air, Inc.	102
Southern Air Transport, Inc.	81
Tower Air, Inc.	58
Arrow Air, Inc.	54
Florida West Airlines, Inc.	53
ABX, Inc.	20
Charter Pool	82
Total	450

2. The carrier allocations in paragraph 1 are subject to the following condition:

Where fewer than 40 percent of a carrier's allocated charters have been used or been committed for use by firm contracts during the six-month period ending December 31, the remaining charter allocations exceeding the number equal to the number of those already operated or committed in the preceding six months will be forfeited and placed in the charter pool;

3. We establish a charter pool subject to the following conditions:

(a) Distributions will be made to eligible applicants on a first-come, first-served basis with operations under such distributions limited to four per applicant per month;

(b) Carriers receiving advance allocations are not eligible applicants until after December 31, 1996. Carriers holding scheduled combination or all-cargo authority in the U.S.-Brazil market are not eligible applicants until after April 30, 1997;

(c) Applications to operate charters may be filed no earlier than 30 days in advance of the flight date; and

(d) Applications must identify (i) the number of flights requested, (ii) proposed flight dates including a four-day service window; (iii) the charterer(s), (iv) the city-pair markets involved by direction, (v) the type of aircraft to be used, and (vi) the type of cargo to be transported. Copies of the charter contract or some form of written evidence of the charter commitment is required at the time a charter is requested;

4. We require that each carrier allocated charters in this proceeding inform the U.S. Air Carrier Licensing Division (X-44), Office of International Aviation, by letter no later than January 3, 1997, of the number of charters it has operated or has committed by firm contracts: For charters under contract, carriers shall indicate the charterer(s), dates, city-pair markets, and nature of traffic and must submit evidence of signed contracts for those charters;

5. We require each carrier allocated flights or receiving flights from the charter pool to notify the U.S. Air Carrier Licensing Division (X-44), Office of International Aviation, no later than the tenth day of each month (or until its charters are exhausted, whichever occurs earlier) of: (1) the number of Brazil all-cargo charters operated during the preceding month; (2) the city-pairs served by direction; (3) the date of each flight; (4) the charterer(s); (5) the type of aircraft used; (6) the type of cargo carried; and (7) the number of charters for which Brazilian authority was obtained for that month which subsequently were canceled or rescheduled.<sup>10</sup> Carriers allocated charters shall notify the Department and the Government of Brazil whether

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<sup>10</sup> Reports on flights operated from the charter pool under a Notice of Consistency should also identify the date of the Notice granting the flights. A statement should be included as well verifying that the Government of Brazil has been notified in writing of changes and/or cancellations of flights.

or not any charters have been operated by the carrier during the month.<sup>11</sup> After April 30, 1997, each carrier allocated flights from the charter pool is required to report such operations no later than seven days after operation of each flight obtained from the charter pool;

6. We delegate to the Director, Office of International Aviation, the authority to administer distribution of flights from the charter pool proposed in this order and, where deemed in the public interest, to waive the restrictions on the charter pool;

7. We revoke the allocation made to Fine Airlines for the month of July; and

8. We will serve a copy of this order on the carriers listed in the appendix to this order; the Ambassador of Brazil in Washington, D.C., and the U.S. Department of State (Office of Aviation Negotiations).

By:

PATRICK V. MURPHY  
Deputy Assistant Secretary for  
Aviation and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at  
<http://www.dot.gov/dotinfo/general/orders/aviation.html>.*

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<sup>11</sup> Carriers are advised that they must follow the Brazilian Government's procedures for notification of change or cancellation or be subject to forfeiture of those charters by the Brazilian Government.

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